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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

314-666

No. 356

H. S. OLIVER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

No. 357

C. P. SELLERS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUGH B. WOODWARD,
C. RAY SMITH,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writs of certiorari	1
Statement	2
Reasons relied upon for allowance of the writs	3
Brief in support of petition	5
Opinion of the court below	5
Statement of grounds of jurisdiction	5
Statement of the case	5
Specification of errors	5
Argument	6
Conclusion	10

Table of Cases Cited.

Berger v. *United States*, 295 U. S. 78, 55 Sup. Ct. 629, 79 L. Ed. 1314	6
Little v. *United States*, 73 F. (2d) 861	8
United States v. *Motlow*, 10 F. (2d) 657	4

Statutes Cited.

18 U. S. C. A. 88 (Criminal Code, Sec. 37)	2
28 U. S. C. A. 347	5

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

That the United States Circuit Court of Appeals for the Tenth Circuit did, on the 9th day of June, 1941, hand down

a decision affirming a conviction of petitioners on a charge of conspiracy to violate the laws of the United States, 18 U. S. C. A. 88 (Sec. 37, Criminal Code), and on, to-wit, the 11th day of July, 1941, your petitioners' consolidated motion for rehearing was denied.

Petitioners were convicted under an indictment which charged that they and twenty-four (24) others named therein did unlawfully and feloniously conspire and devise a cheme for obtaining money and property by false and fraudulent pretenses and representations from numerous persons, including the public generally, for the purchase of oil and gas leases on land owned by the State of New Mexico. It was further charged that it was a part and object of said conspiracy that the mails of the United States would be used for the purpose of carrying it into execution.

Petitioners assigned as error to the Circuit Court:

(1) That there was a fatal variance between indictment and proof in that one large conspiracy was charged and disconnected smaller conspiracies of a different kind were proved—that the proof showed that instead of being conspirators, as charged, the defendants, including petitioners, were, in fact, generally competitors.

(2) That this theory of appellants' defense should properly have been presented to the Jury by adequate requested instructions.

(3) That the trial Court erred in refusing petitioners' request, *in limine*, to apply the "Rule" with respect to the separation of witnesses.

Petitioners would show this Court that the learned Tenth Circuit Court erred in failing to reverse and remand the cases on each of the above points.

Reasons Relied Upon for Allowance of the Writs.

I.

In the humble opinion of counsel for petitioners, on the basis of the three assignments of error to the Circuit Court, *supra,* these cases present to this Court such an outstanding example of a clear abuse of the Conspiracy Statute and such an outstanding example of an unfair trial and clear abuse of the judicial process as to call for an exercise of this Court's power of supervision.

It is submitted that the record clearly shows that the appellants and the other defendants named in the indictment were not conspirators, but were, in fact, competitors; that the only privity between the defendants charged in the indictment was the uncommunicated intention of violation of the same law. Appellants urge that the record shows a gross abuse of the Conspiracy Statute in that all of the defendants named in the indictment were brought to trial at the same time in one trial. That the prosecution was permitted to prove the unrelated frauds of each of the defendants named in the indictment. That with this mass of proof before the jury, it was impossible for the defendants-appellants to obtain a fair and impartial trial and it was impossible for the jury to exclude from its consideration the proof admitted by the trial court which did not, in any way, relate to or affect any action or want of action on the part of the appellants, but which proof was strongly prejudicial to appellants. That said abuse was exaggerated by the failure of the trial court, although requested so to do, to safeguard the appellants by presenting to the jury clear, adequate and proper instructions. That the appellants were further prejudiced by the action of the trial court in permitting the court room, within which the appellants were being tried to be packed with approximately one hun-

dred (100) government witnesses with their friends and sympathizers, all of whom were intensely hostile to appellants and their co-defendants.

The record in this case, counsel submit, presents clearly the type of misuse of the Conspiracy Statute in criminal prosecution so strongly denounced by Mr. Justice Butler in *United States* v. *Motlow,* 10 F. (2d) 657. Yet, such use of the Conspiracy Statute is being made with increasing frequency by the prosecuting attorneys for the United States throughout the Nation.

Here, this Court is respectfully petitioned to exercise its supervisory powers and lay down principles of law and procedure in conspiracy cases to the end that fair and impartial trials may be had and the rights of innocent defendants will not be prejudiced.

Respectfully submitted,

HUGH B. WOODWARD,
211 North Second Street,
Albuquerque, New Mexico;
C. RAY SMITH,
211 North Second Street,
Albuquerque, New Mexico,
Counsel for Petitioners.